Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LYLE DAVID PIERCE, III, also known as Sealed Deft. 2, also known as Joe Martin, also known as Joe Boy,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. § 1343, may be used to prosecute an alleged scheme to defraud a foreign country of tax revenue.

PARTIES TO THE PROCEEDING

In addition to the named parties, Robert Trapilo, Regina Pierce, and Wayne Stehlin were appellants in the United States Court of Appeals for the Second Circuit. Further, Carl Tarbell, Patricia Tarbell, and Arthur Tarbell were also defendants in the United States District Court for the Northern District of New York.

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PETITION FOR A WRIT OF CERTIORARI

Lyle David Pierce, III, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which reversed the United States District Court for the Northern District of New York's order dismissing the indictment in this criminal case.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 130 F.3d 547 (2d Cir. 1997), and reprinted as Appendix A, *infra*, 1a-12a. The unreported opinion of the United States District Court for the Northern District of New York dismissing the indictment against Lyle David Pierce, III, is reprinted as Appendix B, *infra*, 13a-20a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 5, 1997. Lyle David Pierce, III, filed a timely Petition for Rehearing containing a suggestion that the action be reheard *in banc*. The Petition for Rehearing was denied on February 5, 1998. The Order denying the Petition for Rehearing is reproduced as Appendix C, *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 1343 of Title 18 of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pre-

> tenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1956(h) of Title 18 of the United States Code provides:

> Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Section 1956(c)(7)(A) defines "specified unlawful activity" as including "any act or activity constituting an offense listed in [18 U.S.C.] section 1961(1) of this title (with exceptions not pertinent here)." Wire fraud under 18 U.S.C. § 1343 is among the offenses listed in § 1961(1).

Statement of the Case

Lyle David Pierce, III, is an aboriginal person who has resided within the sovereign area of Akwesasne most of his life.[1] Akwesasne is occupied by aboriginal people and their representatives. Among the aboriginal people occupying Akwesasne are members of the Mohawk Nation. Akwesasne straddles the north and south side of the Saint Lawrence River and the border between New York in the United States and Canada. The 1783 Treaty of Paris fixed the international boundary through the heart of Akwesasne, creating the unique situation where separate aboriginal communities occupy a sovereign

[1] The petitioner's self description is "aboriginal person" which others refer to as "Indian" and "Native American."

area that straddles the boundary between two separate countries.

On February 29, 1996, the United States Attorney for the Northern District of New York charged Mr. Pierce and others with conspiracy under 18 U.S.C. § 1956(h), a provision of the money laundering statutes, to engage in a scheme to defraud the Canadian government of tax revenue by utilizing the United States' wire communications system to order liquor which was delivered to Akwesasne, stored there, and then later taken into Canada without paying Canadian duties and taxes. The indictment is reproduced as Appendix D, *infra*, 22a-28a. The funds allegedly gained from the sale of liquor in Canada were then transported back to Akwesasne and used to pay for additional goods, thereby allegedly promoting a continuing scheme to defraud the Canadian government. (App. D, 22a-28a). This alleged wire fraud in violation of 18 U.S.C. § 1343 is the "specified unlawful activity" the government argues served as the basis for the alleged money laundering conspiracy. The indictment does not cite a Canadian statute that imposed an obligation on Mr. Pierce to pay Canadian taxes or duties. (App. D, 22a-28a).

In July 1996, following the decision of the United States Court of Appeals for the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, ____ U.S. ____, 117 S. Ct. 263 (1996), Mr. Pierce, relying on *Boots*, moved to dismiss the indictment. The First Circuit in *Boots* had held that the conviction of the appellants for wire fraud based on a scheme to defraud Canada of tobacco tax revenue violated the common law "revenue rule." That rule provides that courts generally should not enforce foreign tax judgments. The United States District Court for the Northern District of New York agreed with the First Circuit's decision in *Boots*, and on December 20, 1996, dismissed the indictment against Mr.

Pierce and the other defendants. In doing so, it held that a scheme to defraud a foreign government of tax revenue falls outside of the purview of the wire fraud statute, 18 U.S.C. § 1343. (App. B, 13a-20a). The United States appealed.

The Second Circuit disagreed with the First Circuit and held that the wire fraud statute applies to *any* scheme to defraud, including a scheme to defraud a foreign government of tax revenue. (App. A, 1a-12a). The Second Circuit stated that since 18 U.S.C. § 1343 does not require a scheme to defraud to be actually successful, there was no need to interpret or enforce Canadian law and thereby trigger a violation of the "revenue rule." (App. A, 1a-12a). For these reasons, the Second Circuit concluded that "a scheme to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute, 18 U.S.C. § 1343," and reversed the order of the district court dismissing the indictment. (App. A, 12a). The Second Circuit acknowledged that the First Circuit took a contrary position concerning its interpretation of 18 U.S.C. § 1343. (App. A, 3a).

Reasons for Granting the Petition

Petitioner seeks the intervention of this Court to resolve a split between the Courts of Appeals for the First and Second Circuits over whether a scheme to defraud a foreign government of tax revenue is within the purview of the wire fraud statute, 18 U.S.C. § 1343. The Second Circuit's decision in this case, *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), directly conflicts with the First Circuit's decision in *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, ____ U.S. ____, 117 S. Ct. 263 (1996), and creates confusion over the extent to which federal prosecutors can use criminal fraud statutes to intervene in conduct involving alleged crimes against the governments of other countries.

The *Boots* and *Trapilo* cases are not isolated prosecutions. The United States Attorney's Office in the Northern District of New York has recently initiated another prosecution of 22 defendants on wire fraud and money laundering charges relating to an alleged scheme to defraud Canada of tax revenue. *See United States v. Miller, et al.*, Criminal Action No. 97-CR-199 (RSP). Because the mail and wire fraud and money laundering statutes are so expansive in scope, cases like *Trapilo* will stimulate ever broader international utilization of these federal criminal statutes. The outcome of these cases should not and cannot be allowed to depend solely on the circuits in which the charges are brought. The conflict between the First and Second Circuits will mean that some aboriginal people will be subject to inconsistent treatment since conduct which can serve as the basis for prosecution under the wire fraud statute in the Second Circuit is not subject to prosecution in the First Circuit. This petition should be granted to avoid disparity in how the different rulings influence aboriginal citizens. This is especially important in light of the severe punishments that may result under federal sentencing guidelines in those circuits following the Second Circuit's ruling.

The Second Circuit's interpretation of the wire fraud statute conflicts with the centuries old common law "revenue rule," which prohibits courts from interpreting and enforcing tax laws and judgments of other countries. This policy has even greater significance in the *Boots* and *Trapilo* cases because it raises additional complex questions of legal interpretation relating to the application of Canadian revenue laws to aboriginal people. It is not possible to address Mr. Pierce's alleged obligation to pay Canadian taxes without undertaking a careful analysis of aboriginal rights as affirmed by the Canadian Constitution, common law, and statutes.

I. The United States Courts of Appeals for the First and Second Circuits are Divided Over the Correct Application of the Wire Fraud Statute, 18 U.S.C. § 1343.

The First and Second Circuits' interpretations of the wire fraud statute directly conflict with each other. In fact, the Second Circuit explicitly stated that "[b]ecause we disagree with the reasoning in *Boots*, we reverse the order of the district court." (App. A, 3a).

In Boots, the defendants were convicted of wire fraud conspiracy and wire fraud for intending to defraud Canada of tobacco duties and taxes for using or causing the wires to be used in furtherance of their scheme. *Boots*, 80 F.3d at 585. The defendants in *Boots* were members of the Ganiengehaga Nation and lived in the same area at issue here, Akwesasne. The defendants allegedly transported tobacco across the border through the Passamaquoddy Reservation and into Canada without paying taxes and customs to Canada. Defendants appealed.

The First Circuit concluded that a scheme to defraud a foreign government of tax revenue must be treated differently than a scheme to deprive the United States of domestic taxes or a scheme to defraud a foreign business entity or individual. *Id.* at 587. The First Circuit made this distinction because "[f]oreign customs and tax frauds are intertwined with enforcement of a foreign sovereign's own laws and policies to raise and collect such revenues — laws with which this country may or may not be in sympathy and over which, in any event, we have no authority." *Id.*

The *Boots* court held that the common law "revenue rule" precluded the use of the wire fraud statute in cases involving schemes to defraud a foreign government of tax revenue. Upholding the defendants' conviction of the scheme alleged

would, in effect, enforce Canadian tax laws, a practice prohibited under the "revenue rule." *Id.* The First Circuit found that to convict the defendants of the scheme to defraud Canada, the district court must, of necessity, determine whether the defendants intended to violate Canadian tax laws, even if it was unnecessary for the government to prove the scheme was successful. *Id.* The *Boots* court held that requiring the district court to interpret the operation and validity of Canadian tax law to determine whether there was the requisite intent to defraud violates the "revenue rule." *Id.*

In addition, the court in *Boots* found it significant that the outbound smuggling statute, 18 U.S.C. § 546, which criminalizes the outbound smuggling of goods into a foreign country, only punishes such activity if the foreign country has a reciprocal law. *Id.* at 588.

Finally, the *Boots* court applied the rule of lenity in concluding that, if Congress had meant for the wire fraud statute to be used to uphold foreign tax laws and to criminalize conduct that is subject to foreign laws and not United States' laws, it should have so specified. *Id.* (citing *McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.") (citations omitted)).

For each of these reasons, the *Boots* Court reversed the defendants' convictions for wire fraud and conspiracy to commit wire fraud. *Id.* at 589.

The Second Circuit in this matter examined the exact same issue — whether the wire fraud statute may be used to prosecute a scheme to defraud Canada of tax revenue — and reached the opposite conclusion. (App. A, 1a-12a). The

Second Circuit held that "[t]he statute [18 U.S.C. § 1343] neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." (App. A, 9a).

The Second Circuit said that the success of a scheme to defraud and the identity and location of the victim were irrelevant to violation of the wire fraud statute. (App. A, 10a). It also found that the "revenue rule" did not apply since it was unnecessary to examine or pass on the validity of Canadian tax laws to determine that the defendants had engaged in a scheme to defraud. The object of the scheme to defraud, in the view of the Second Circuit, was not relevant to a wire fraud charge. (App. A, 12a).

In addition, the Second Circuit explicitly rejected the First Circuit's application of the rule of lenity. (App. A, 10a, n.8). Specifically, the Second Circuit found that "[h]ere, there is no "grievous ambiguity or uncertainty" in the wire fraud statute whereby one could rationally read its language to exclude schemes to defraud foreign governments of tax revenue." (App. A, 10a, n.8). To the contrary, the *Boots* court found that before the appellants in that case could be convicted of wire fraud and conspiracy to commit wire fraud, the alleged scheme must plainly fall within the wire fraud statute. 80 F.3d at 588. The *Boots* court held that the alleged scheme to defraud a foreign government of tax revenue was *not* plainly within the meaning of the wire fraud statute. *Id.*

The First and Second Circuits are thus diametrically opposed in their interpretation of whether the wire fraud statute may be employed to prosecute a scheme to defraud a foreign country of tax revenue. In addition, the First and Second Circuits

differed in their interpretation of the rule of lenity.

The circuit split on this issue is clear and intervention of this Court is necessary to resolve this inconsistency. It is particularly important for the Court to do so given the growing interest in the international utilization of federal criminal law.

II. The Application of the Wire Fraud Statute to Alleged Schemes to Defraud a Foreign Government of Tax Revenue is an Important Issue That Will Continue to Arise and Involves Substantial Questions Concerning the Rights of Aboriginal People Under Canadian Law and International Treaties.

The wire fraud statute is a general statute with broad potential applicability.[2] It was not, however, intended to apply to all schemes and conduct everywhere. As the Court of Appeals for the Eleventh Circuit noted in *United States v. Brown*, 79 F.3d 1550, 1556 (11th Cir. 1996), "[a] limitless reading of the mail fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision."[3]

There is nothing in the mail or wire fraud statutes or their legislative histories that indicates that the statutes were in-

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[2] "Proponents hail the statutes as a versatile weapon against fraud—a "catchall" device that encompasses crimes not yet recognized or well defined in other statutes. Critics argue that this strength is also a weakness because these statutes afford prosecutors too much discretion and fail to give adequate notice of exactly what type of conduct the statutes proscribe." John E. Gagliardi, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 Wash. L. Rev. 901 (1993).

[3] This Court has noted that "the mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here." *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

tended to protect foreign countries against fraudulent schemes, especially when schemes relate to avoiding the payment of foreign taxes. As the First Circuit held in *Boots*, "[i]f Congress, notwithstanding these inherent tensions [application of the revenue rule and other, more specific, statutes], had meant to authorize the courts to enforce this kind of application of the wire fraud statute, we think 'it must speak more clearly than it has.'" 80 F.3d at 588 (citing *McNally v. United States*, 483 U.S. 350 (1987)).[4] Otherwise, the wire fraud statute, as construed by the Second Circuit, is left with "its outer boundaries ambiguous" at best. *McNally*, 483 U.S. at 360. It is significant in this regard that the outbound smuggling statute, a more specific statute than the wire fraud statute, was carefully drafted so that it could only be enforced if the foreign country into which goods are being smuggled has a reciprocal smuggling law. 18 U.S.C. § 546.[5]

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[4] For example, when it was unclear whether the mail and wire fraud statutes covered the bribing of foreign governments, Congress enacted a specific statute addressing that activity, the Foreign Corrupt Practices Act. 15 U.S.C. §§ 78dd-1, 2 (Pub. L. 95-213, Title 1, Dec. 19, 1977, 91 Stat. 1494).

[5] Section 546 of Title 18 of the United States Code provides:

Any person owning in whole or in part any vessel of the United States who employs, or participates in, or allows the employment of, such vessel for the purpose of smuggling, or attempting to smuggle, or assisting in smuggling, any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue, and any citizen of, or person domiciled in, or any corporation incorporated in, the United States, controlling or substantially participating in the control of any such vessel, directly or indirectly, whether through ownership of corporate shares or otherwise, and allowing the employment of said vessel for any such purpose, and any person found, or discovered to have been, on board of any such vessel so employed and participating or assisting in any such purpose, shall be fined under this title or imprisoned not more than two years, or both. . . .

The indictment in this case alleged that Mr. Pierce engaged in a scheme to defraud Canada of tax revenue, but failed to specify which Canadian revenue provision, if any, was being violated. Mr. Pierce was provided with no information about what duty was allegedly violated, how the alleged scheme to defraud avoided an obligation to pay Canada tax revenue, or how, as an aboriginal person, the alleged duty to pay Canadian taxes applied to him. This indictment pointedly illustrates the dangers of taking the wire fraud statute to its ambiguous outer boundaries, particularly since it is uncertain under Canadian law whether an aboriginal person has any obligation to pay taxes or duties on goods upon crossing the border between the United States and Canada. *See, e.g.*, Constitution Act of Canada, 1982, Sections 25, 35(1). Recently, the Federal Court of Canada held that Canada's Constitution protected the rights of an aboriginal person to pass freely across the United States — Canada border within Akwesasne and that this right included bringing certain goods into Canada without having to pay customs duties on those goods. *See In the Matter of Grand Chief Mitchell v. The Minister of National Revenue*, 1997 F.C. Trial LEXIS 741 (Federal Court of Canada 1997). The court did not address the issues of whether such rights precluded the imposition of taxes or duties on alcohol being brought into Canada for commercial sale. *Id.*

Moreover, the Second Circuit's opinion conflicts with the international law principle that the United States should not adjudicate conduct occurring abroad unless it has "a substantial, direct, and foreseeable effect" within this country. *See* Restatement (Third) of Foreign Relations § 421 (1987). Along with violating a core international law principle, application of the wire fraud and money laundering statutes to a scheme to defraud a foreign country of tax revenue that has no effect within the United States raises an important issue about

prosecutorial usurpation of control over the conducting of foreign policy. *See Boots*, 80 F.3d at 587-88.

In summary, it is important for this Court to determine the extent to which the wire fraud statute can be used to reach alleged schemes and conduct involving foreign governments.

III. The United States Court of Appeals for the Second Circuit Erred in Reversing the District Court's Order Dismissing the Indictment Because the Common Law "Revenue Rule" Precludes Prosecution of this Matter Under 18 U.S.C. § 1343.

The Court of Appeals for the Second Circuit also erred in reversing the district court's order dismissing the indictment because the common law "revenue rule" precludes prosecution of the scheme to defraud a foreign country of its tax revenue. The "revenue rule" holds that courts generally will not enforce foreign tax judgments. *See* Restatement (Third) of Foreign Relations § 483 (1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."); *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 377 ("[I]t is well established since the day of Lord Mansfield . . . that one State does not enforce the revenue laws of another."), *cert. denied*, 376 U.S. 906 (1963); *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, concurring) ("No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."). The Ninth Circuit summarized the rationale and history of the "revenue rule" in *Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), a case also involving Canada, and held that:

> The revenue rule has been with us for centuries and as such has become firmly embedded in the law. There were sound reasons which supported its original adoption, and there remain sound reasons supporting its continued validity. When and if the rule is changed, it is a more proper function of the policy-making branches of our government to make such a change.

Congress has not altered the "revenue rule," and federal courts continue to rely upon it. *See, e.g., Overseas Inns S.A., P.A. v. United States*, 911 F.2d 1146, 1149 (5th Cir. 1990) ("Comity does not reach so far as to allow one country to adversely affect another's tax revenues."); *United States v. Horst*, 270 F. Supp. 365, 368-69 (D. Del. 1967) ("It is a general rule of international law that in the absence of a treaty provision, one country will not enforce tax claims of another country."). Canadian courts have also utilized the "revenue rule." *See, e.g., United States v. Harden*, 1963 Canada Law Reports 366 (Sup. Ct. of Canada, 1963, *affirming* Court of Appeals for British Columbia) (cited in *Her Majesty the Queen v. Gilbertson*, 597 F.2d at 1166).

The Second Circuit held that "there is no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule is not properly implicated." (App. A, 12a). The court reached this result by determining that even if Mr. Pierce did not violate Canadian law, this was irrelevant to the ultimate determination of whether he violated the wire fraud statute. The Second Circuit concluded that the only relevant inquiry that needed to be made was to ascertain if Mr. Pierce intended to engage in the alleged scheme to defraud.[6] (App. A, 10a-11a).

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[6] The Second Circuit cites *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992), for the undisputed proposi-

(Footnote continued to next page)

This reasoning was properly rejected in *Boots*. As the First Circuit held in *Boots*, it is essential to take the object of the alleged scheme to defraud into consideration, (*i.e.*, the evading of Canadian tax and customs laws) in determining whether a defendant had the requisite intent to violate the wire fraud statute in the first instance. 80 F.3d at 587. The government's prosecution of Mr. Pierce must be based upon something other than its bald assertion of a scheme to deprive Canada of tax revenues due and owing from an unspecified statute or regulation.[7] The government must instead prove that Mr. Pierce had the requisite intent to violate specific Canadian revenue laws that were applicable to him. *See McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 790 (1st Cir. 1990) (noting that "to establish that the appellees violated the mail and/or wire fraud statutes, McEvoy must show that the appellees engaged in a scheme to defraud with the specific intent to defraud . . . "). As indicated in *Boots*, the government must establish that Mr. Pierce had some obligation to pay Canadian taxes for the activities in which he allegedly planned to engage. In determining whether the government has met this burden, the district court will inevitably have to interpret Canadian revenue laws, which, in turn, will trigger the application of the "revenue rule."

Moreover, under *Cheek v. United States*, 498 U.S. 190 (1991), a defendant has the right to establish in a tax prosecution that he had a good faith belief that he did not have an obligation to pay the particular taxes. The failure of the government to set forth the underlying Canadian statute prevents Mr.

(Footnote continued from preceding page)
tion that success of the alleged scheme to defraud is not necessary for prosecution under the wire fraud statute. (App. A, 11a).

[7] Unlike the indictment in this case, the *Boots* indictment specifically set forth the Canadian statutes allegedly violated by the defendants in that case.

Pierce from being able to raise and the district court from analyzing the merits of that argument. This makes it essential that the district court examine the alleged Canadian tax obligation at issue, which, in turn, implicates the "revenue rule."

The government might argue that the application of the "revenue rule" would frustrate its efforts in assisting one of our international partners in an area where the United States and Canada share a common law enforcement interest. The decision to apply the "revenue rule," however, should not be made on a case-by-case assessment of the particular foreign country involved. As stated in *Boots*:

> [A]pplication of the wire fraud statute to a scheme of this type does not, and cannot, turn upon our attitude towards Canada alone. The revenue rule has not risen or fallen over the centuries based on country-by-country judicial assessments of the potential for a foreign relations conflict.

80 F.3d at 588. Any decision to ignore the requirements of the rule should be left to Congress and not to the decisions of individual federal judges.

There is yet one further reason why this Court should review the Second Circuit's decision. In rejecting the application of the "revenue rule," the Second Circuit also ignored the dictates and implications of 18 U.S.C. § 1956, the money laundering statute. By permitting the filing of section 1956 charges and the utilization of its forfeiture penalties in this case, the Second Circuit has created the potential that federal charges may be brought for the sole purpose of enforcing and collecting *foreign* taxes. This is ironic in view of the fact that the language of section 1956 expressly precludes its similar use for tax offenses within the United States.

Congress excluded tax evasion or any other tax offense as specified unlawful activity for purposes of the money laundering statute. A reason why tax evasion is not a specified unlawful activity is because it does not generate "proceeds" to be laundered under the money laundering statute. The drafters of the Senate Report explained that:

> The section [§ 1956(a)(1)(A)(ii)], as drafted, does not require that the funds involved in a transaction represent the "proceeds" of tax evasion because tax evasion, unlike other crimes, does not have any clearly identifiable proceeds. Rather the section requires that the transaction be conducted with the intent to facilitate tax evasion.

Senate Comm. on the Judiciary, The Money Laundering Crimes Act of 1986, S. Rep. No. 99-433, 99th Cong. 2d Sess. at 11-12 (1986). "Proceeds" are also not generated through an alleged scheme to defraud Canada by violating the wire fraud statute.

In summary, the Second Circuit erred in not upholding the district court's determination that the common law's "revenue rule" precludes the prosecution of Mr. Pierce.

Conclusion

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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May 5, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 111 August Term, 1997
(Argued August 28, 1997 Decided December 5, 1997)

Docket No. 97-1011

UNITED STATES OF AMERICA,
Appellant,

v.

ROBERT TRAPILO, also known as Sealed Deft. 1, LYLE DAVID PIERCE, III, also known as Joe Boy; REGINA PIERCE, also known as Sealed Deft. 3, and WAYNE STEHLIN, also known as Sealed Deft. #7,
Defendants-Appellees,

CARL TARBELL, also known as Sealed Deft. #4, also known as Jake; PATRICIA TARBELL, also known as Sealed Deft.#5, also known as Patty, and ARTHUR TARBELL, also known as Sealed Deft. #6,
Defendants.

Before: MESKILL and JACOBS, *Circuit Judges*, and KORMAN, *District Judge*.

Appeal from the December 20, 1996 order of the United States District Court for the Northern District of New York, Pooler, *J.*, dismissing a one count indictment that alleged money laundering conspiracy in violation of 18 U.S. C. § 1956. The conspiracy charge was brought in connection with an alleged series of domestic and foreign financial transactions

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* Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

that involved the proceeds of, and were intended to promote, a scheme to defraud the Canadian government of tax revenue, in violation of the wire fraud statute, 18 U.S.C. § 1343. The district court dismissed the indictment, holding that a scheme to defraud a foreign government of tax revenue does not fall within the purview of the wire fraud statute.

Reversed and remanded.

GREGORY A. WEST, Assistant United States Attorney, Northern District of New York, Syracuse, NY (Thomas J. Maroney, United States Attorney for the Northern District of New York, Syracuse, NY, of counsel), *for Appellant.*

K. Michael Sawicki, Buffalo, NY, (Zdarsky, Sawicki & Agostinelli, Buffalo, NY, of counsel), *for Appellee Lyle David Pierce, III.*

MARSHA A. HUNT, Syracuse, NY, *for Appellee Regina Pierce.*

Kevin E. McCormack, Hancock & Estabrook, on the brief, *for Appellee Robert Trapilo.*

MESKILL, *Circuit Judge:*

This appeal presents the question of whether a scheme to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute, 18 U.S. C. § 1343. In addressing that issue, the district court adopted the reasoning of the First Circuit in *United States v. Boots,* 80 F.3d 580 (1st Cir.), *cert. denied,* 117 S.Ct. 263 (1996), and concluded

that the common law "revenue rule" and other prudential considerations precluded application of the federal wire fraud statute in alleged schemes to defraud foreign governments of tax revenue. Because we disagree with the reasoning in *Boots*, we reverse the order of the district court.

BACKGROUND

In recent years, Canada has dramatically raised taxes and duties on the sale of liquor and tobacco products. These tax increases have created a lucrative "black market" for smugglers, who buy liquor and tobacco products in the United States and secretly deliver them into Canada for resale in various Canadian cities.

On February 29, 1996, the government filed a one count indictment in the United States District Court for the Northern District of New York, charging Robert Trapilo, Lyle David Pierce, III, Regina Pierce and Wayne Stehlin with a money laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1)-(2) and (h).[1] The indictment alleges that the

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[1] Section 1956, Laundering of monetary instruments, provides, in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> . . .
>
> . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. (footnote continued)

appllees conspired to engage in a series of financial transactions that involved the proceeds of, and were intended to promote, a scheme to defraud the Canadian government of tax revenue, in violation of the wire fraud statute, 18 U.S.C. § 1343. This "scheme to defraud" constitutes the specified unlawful activity for purposes of the money laundering statute.[2]

The conspiracy charge arises out of the appellees' alleged participation in a smuggling organization that operated within the St. Regis Mohawk Indian Reservation in upstate New York. The reservation, consisting of a five mile strip of land straddling the international border between the state of New York and the Canadian provinces of Quebec and Ontario, allegedly served as the conspiracy's hub for the delivery of tax free liquor into Canada.

The appellees are alleged to have ordered large shipments of liquor products through interstate telephone calls, facsimiles, and wire transmissions, and are believed to have stored these

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> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> (A) with the intent to promote the carrying on of specified unlawful activity; . . .
>
> . . . .
>
> (h) Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956.

[2] Section 1956(c)(7)(A) defines "specified unlawful activity" as including "any act or activity constituting an offense listed in section 1961(1) of this title (with exceptions not pertinent here)." 18 U.S.C. § 1956(c)(7)(A). Wire fraud is among the offenses listed in § 1961(1).

products in warehouses on the reservation. On various occasions, the appellees and those acting in concert with them, are alleged to have then transported the liquor across the St. Lawrence River and into Canada, avoiding Canadian customs. Other participants are then believed to have delivered the products to black marketeers operating in such cities as Montreal and Toronto.

The indictment alleges that Canadian currency generated by the black market liquor sales was thereafter transported back into the United States where it was exchanged and/or deposited to purchase bank drafts or wire transfers. These funds were then used to pay for additional goods, thereby promoting the scheme to defraud the Canadian government of tax revenue.

On July 3, 1996, the appellees moved to dismiss the indictment, arguing that in accordance with *Boots* the government did not have the authority to prosecute wire fraud aimed at defrauding a foreign government of tax or custom revenue.[3]

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[3] The appellees also argued that the simple act of smuggling, without an allegation of misrepresentation or deceit, does not satisfy the requirements for a scheme to defraud under the wire fraud statute. Because the district court did not address this argument, the appellees assert it here as an additional ground for affirmance. We conclude that this argument has no merit. The term "scheme to defraud" is measured by a "'nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general [and] business life of members of society.'" *United States v. Von Barta*, 635 F.2d 999, 1005 n.12 (2d Cir. 1980) (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958)), *cert. denied*, 450 U.S. 998 (1981); *accord United States v. Ragosta*, 970 F.2d 1085, 1090 (2d Cir.), *cert. denied*, 506 U.S. 1002 (1992). "The scheme exists although no misrepresentation of fact is made." *Gregory*, 253 F.2d at 109 (citation and internal quotation marks omitted); *accord United States v. Richman*, 944 F.2d 323, 331-32 (7th Cir. 1991); *McEvoy Travel Bureau v. Heritage Travel*, 904 F.2d 786, 791 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990). Because the act of smuggling

(footnote continued)

In *Boots*, three defendants were convicted of conspiracy to violate the federal wire fraud statute, among other things, in connection with a scheme to transport tobacco into Canada without paying Canadian taxes and excise duties. *See Boots*, 80 F.3d at 583-85. On appeal, the First Circuit reversed the convictions, holding that a scheme to defraud the Canadian government of tax revenue is beyond the reach of the wire fraud statute. Specifically, the court concluded that for purposes of the wire fraud statute, it could not determine whether the defendants had the requisite intent to defraud without first assessing the validity of foreign revenue law. *Id.* at 587-88. As the court reasoned, its authority to assess the validity of foreign revenue law was precluded by the common law revenue rule, which holds that our courts will normally not enforce foreign tax judgments,[4] the rationale for which is that issues of foreign relations are assigned to, and better handled by, the legislative and executive branches of the government. Because it was foreclosed from passing on the validity of foreign revenue law, the court could not determine whether the defendants had violated the wire fraud statute. *Id.*

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violates fundamental notions of honesty, fair play and right dealing, it is an act within the meaning of a "scheme to defraud."

[4] "The rationale of the revenue rule has been said to be that revenue laws are positive rather than moral law; they directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts: for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government." *Boots*, 80 F.3d at 587; *see also Her Majesty the Queen v. Gilbertson*, 433 F.Supp. 410, 411 (D. Or. 1977), *aff'd*, 597 F.2d 1161 (9th Cir. 1979). *But cf. Restatement (Third) of the Foreign Relations Law of the United States* § 483, Reporters Note 2 at 613 (1987) ("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete.").

The *Boots* Court also noted that aside from revenue rule considerations, a decision upholding the convictions under the wire fraud statute could license the prosecution of persons who use the wires of the United States to engage in smuggling schemes, even though the federal statute that specifically criminalizes the smuggling of goods into a foreign country punishes such conduct only if that foreign country has a reciprocal law. *Id.* at 588 (citing 18 U.S.C. § 546.)[5]

On December 20, 1996, the district court issued its Memorandum-Decision and Order, granting the appellees' motion to dismiss. The district court, relying on *Boots*, concluded that the defendants could not be convicted of money laundering conspiracy because it could not determine whether the defendants had the requisite fraudulent intent to sustain the underlying unlawful activity of wire fraud. Specifically, the district court concluded that it could not determine whether the defendants had the requisite intent to defraud without first passing on the validity of foreign revenue law, and stated "[i]f the law [the defendants] intended to violate was not valid, the defendants could not have had [the requisite] criminal intent [to defraud]." Because the court reasoned that, in accordance with *Boots*, the common law revenue rule precluded inquiry

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[5] Section 546, smuggling goods into foreign countries, provides, in pertinent part:

> Any person owning in whole or in part any vessel of the United States who employs . . . such vessel for the purpose of smuggling . . . any merchandise into the territory of any foreign government in violation of the laws there in force, [and] if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue . . . [then that person] shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 546.

into the validity of foreign revenue laws, the indictment could not be sustained.

On appeal, the government contends that the district court erred in dismissing the indictment. Specifically, the government asserts that contrary to the conclusion of the *Boots* Court and the court below, the wire fraud statute condemns *any scheme* to defraud where interstate or foreign telecommunications systems are used, and does not require the court to determine the validity of Canadian tax law prior to finding a violation of the statute. In this regard, the government avers that because the essence of *any scheme* to defraud is a defendant's fraudulent intent, the appellees are not exempt from the strictures of the wire fraud statute simply because the object of the scheme involved defrauding a foreign government of tax revenue. We agree.

DISCUSSION

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 18 U.S. 76, 95-96 (5 Wheat.) (1820) (Marshall, *C.J.*).

The wire fraud statute provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for

> the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343. The language of the statute unambiguously prohibits the use of interstate or foreign communication systems by anyone who "intend[s] to devise *any* scheme or artifice to defraud." *Id.* (emphasis added); *United States v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984). The statute is limited in scope to the protection of money or property rights. *McNally v. United States*, 483 U.S. 350, 359-60 (1987).[6] The statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute.

Under both the mail fraud and wire fraud statutes,[7] "[t]he thing which is condemned is (1) the forming of the scheme to defraud, however and in whatever form it may take, and (2) a use of [mail and wire communications] in its furtherance. If that is satisfied, more is not required." *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (emphasis omitted); *accord United States v. Eskow*, 422 F.2d 1060, 1064 (2d Cir.), *cert. denied*, 398 U.S. 959 (1970); *United States v. Fromen*,

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[6] Congress overruled the holding in *McNally* when it enacted 18 U.S.C. § 1346, which provides "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

[7] The wire fraud statute, 18 U.S. C. § 1343, is the "lineal descendant" of the mail fraud statute, 18 U.S.C. § 1341. *McNally v. United States*, 483 U.S. 350, 374 (1987) (citation and internal quotation marks omitted). "Because these statutes use the same relevant language, they are analyzed in the same way." *United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996); *see also Von Barta*, 635 F.2d at 1005 n.11 ("scheme or artifice to defraud" language in both mail and wire fraud statutes is construed uniformly).

265 F.2d 702, 705 (2d Cir.). *cert. denied*, 360 U.S. 909 (1959). In the past, we have concluded that the wire fraud statute was applicable to a scheme to defraud the State of New York of cigarette taxes, stating that its focus "is upon the misuse of the wires, not the regulation of state affairs." *DeFiore*, 720 F.2d at 761. We have also upheld a conviction under the mail fraud statute where the evidence demonstrated that the defendant *intended* to defraud the State of New York of tax revenue, but failed to prove that any taxes were actually due. *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) ("Section 1341 punishes the *scheme*, not its success."), *cert. denied*, 502 U.S. 1091 (1992); *see also Durland v. United States*, 161 U.S. 306, 313 (1896) (for purposes of the statute, the "significant fact is the intent and purpose"). These cases teach, as the statute plainly states, what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property. Nothing more is required. The indentity and location of the victim, and the success of the scheme, are irrelevant.[8]

[8] The appellees also argue that the Rule of Lenity provides an additional reason for affirmance. We conclude that the Rule of Lenity is not applicable to this case. That rule provides that where there is a "grievous ambiguity or uncertainty in the language and structure [of a statute]," *Chapman v. United States*, 500 U.S. 453, 463 (1991) (citation and internal quotation marks omitted), such that "there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language," *McNally v. United States*, 483 U.S. 350, 359-60 (1987). A statute does not become ambiguous merely because "[it] has been applied in situations not expressly anticipated by Congress." *National Organization For Women v. Scheidler*, 510 U.S 249, 262 (1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotation marks omitted)). Here, there is no "grievous ambiguity or uncertainty" in the wire fraud statute whereby one could rationally read its language to exclude schemes to defraud foreign governments of tax revenue. The statute explicitly covers "any scheme to defraud," and expressly covers frauds involving foreign transactions.

The statute reaches *any* scheme to defraud involving money or property, whether the scheme seeks to undermine a sovereign's right to impose taxes, or involves foreign victims and governments. *See United States v. Porcelli*, 865 F.2d 1352, 1358 (2d Cir.) (scheme involved defrauding New York state of state sales taxes), *cert denied*, 493 U.S. 810 (1989); *Helmsley*, 941 F.2d at 94 (scheme involved intent to defraud New York state of income taxes); *see also United States v. Gilboe*, 684 F.2d 235, 237-38 (2d Cir. 1982) (scheme involved defrauding Chinese government, where the telecommunication systems of the United States were used in transferring certain Chinese payments from a New York bank to a Bahamas bank), *cert. denied*, 459 U.S. 1201 (1983); *United States v. Goldberg*, 830 F.2d 459, 464 (3d. Cir. 1987) (indictment for wire fraud authorized where scheme involved wire communications between Pennsylvania and Canada).

At the heart of this indictment is the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws. *See, e.g., DeFiore*, 720 F.2d at 761-62. The statute condemns the intent to defraud, that is, "the forming of the scheme to defraud, however and in whatever form it may take." *Gregory*, 253 F.2d at 109. The intent to defraud does not hinge on whether or not the appellees were successful in violating Canadian revenue law, as "[s]ection 1341 punishes the *scheme*, not its success." *Helmsley*, 941 F.2d at 94.[9] Con-

[9] Our holding today is not only fully consistent with the plain meaning of the wire fraud statute and decades of jurisprudence developed thereunder, but it is also consistent with the law of conspiracy. Where, as here, an indictment alleges conspiracy, legal impossibility affords a conspirator no defense. *United States v. Feola*, 420 U.S. 671, 693 (1975). "[T]he crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts . . ., and is not at

(footnote continued)

sequently, there is no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule is not properly implicated.

The simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters reserved exclusively to the legislative and the executive branches of our government. We concern ourselves only with what has been expressly forbidden by statute — the use of the wires in the scheme to defraud. Whether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collection of taxes, is not our Court's concern. Therefore, the presence or absence of reciprocal smuggling laws is irrelevant. Our goal is simply to vindicate the intended purpose of the statute, that is, "to prevent the use of [our telecommunication systems] in furtherance of fraudulent enterprises." *United States v. Von Barta*, 635 F.2d 999, 1005 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981) (citations omitted).

CONCLUSION

We therefore hold that a scheme to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute, 18 U.S.C. § 1343, and reverse the order of the district court that dismissed the indictment alleging a money-laundering conspiracy in violation of 18 U.S.C. § 1956 and remand to the district court for further proceedings.

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all dependent upon the ultimate success or failure of the planned scheme." *United States v. Everett*, 692 F.2d 596, 600 (9th Cir. 1982) (citation and internal quotation marks omitted), *cert. denied*, 460 U.S. 1051 (1983). "[T]he impossiblity that the defendants' conduct would result in consummation of the contemplated substantive crime is not persuasive or controlling." *United States v. Meyers*, 529 F.2d 1033, 1037 (7th Cir.), *cert. denied*, 429 U.S. 894 (1976).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

96-CR-54

ROBERT TRAPILO, LYLE DAVID PIERCE, III, a/k/a "Joe Martin," a/k/a "Joe Boy," REGINA PIERCE, CARL TARBELL, a/k/a "Jake," PATRICIA TARBELL, a/k/a "Patty," ARTHUR TARBELL, and WAYNE STEHLIN,

Defendants.

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
DEC 20 '96
GEORGE A RAY, CLERK
SYRACUSE

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ROSEMARY S. POOLER, D.J.

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Defendants request that I dismiss an indictment charging that they conspired to violate the money laundering statute, 18 U.S.C. § 1956, in furtherance of a scheme to defraud a foreign government of tax revenues. Based on *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 117 S.Ct. (1996), I grant defendants' request and dismiss the indictment. This dismissal moots the remainder of defendants' pre-trial requests.

BACKGROUND

On February 29, 1996, the grand jury issued indictment 96-CR-54 (the "first indictment") which charged Robert Trapilo, Lyle David Pierce, III, Regina Pierce, Carl Tarbell, Patricia Tarbell, and Arthur Tarbell with one count of conspiracy to (1) engage in financial transactions and (2) transport currency to a place in the United States from Canada with the intent to further a wire fraud scheme aimed at depriving the Canadian government of tax revenues in violation of 18 U.S.C. § 1956(h). In a separate count, the government also seeks criminal forfeiture of $6,831,072.38 on this indictment.

The first indictment charges that (1) the defendants conspired to bring liquor through the St. Regis Mohawk Indian Reserva-

tion ("Akwesasne"), which straddles the United States/Canadian border, into Canada without payment of Canadian duties and taxes; (2) they used interstate telephone calls, facsimile and wire transmissions to purchase the liquor; and (3) the defendants then laundered the profits by converting them into United States currency. Dkt. No. 1.

The grand jury issued another indictment, 96-CR-188 (the "second indictment"), on June 13, 1996. This indictment charges Trapilo, Regina and Lyle David Pierce, III, and Stehlin with conspiracy to introduce intoxicating liquor into "Indian Country" (conduct prohibited by 18 U.S.C. § 1154) in violation of 18 U.S.C. § 371. It also carges Robert Trapilo with four counts (August 3, 4, 8, and 9, 1994) of causing Arthur Tarbell to bring more than $10,000 into the United States without making the appropriate disclosure in violation of 31 U.S.C. § 5316(a)(1)(B), 5322(a) and 18 U.S.C. § 2. Trapilo is also charged with conspiracy to violate 18 U.S.C. §§ 5316(a)(1)(B) and 5322(a). Finally, the second indictment seeks forfeiture on the violations of 31 U.S.C. §§ 5316(a)(1)(B) and 5322(a).

Defendants Trapilo, Lyle David Pierce, III, Stehlin, and Regina Pierce moved to dismiss the first indictment. Dkt. Nos. 55, 57, 61, 64. Defendant Trapilo also requested that for trial purposes I join the first indictment with the second indictment. Dkt No. 55. Finally, all defendants requested a bill of particulars and Trapilo and Regina Pierce made certain discovery and other pretrial requests. Trapilo also made motions with respect to the second indictment that I treat in a separate order.

The government opposed dismissal, supported joinder, resisted granting a bill of particulars and most of defendants' discovery requests, and requested reciprocal discovery. I heard oral argument on all motions except Regina Pierce's on September 9, 1996, and heard oral argument on Ms. Pierce's motions on

Ms. Pierce's motions on October 7, 1996. I ruled from the bench on all of the parties' motions except those for dismissal and joinder.

DISCUSSION

1. Dismissal of the First Indictment

The defendants argue that this indictment must be dismissed pursuant to *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 117 S.Ct. 263 (1996) because the prosecution constitutes an improper attempt to enforce a foreign government's revenue laws. Lyle David Pierce, III, and Stehlin also argue that the government has failed to allege sufficiently a misrepresentation on the part of their clients.

The first indictment charges defendants with violation of 18 U.S.C. § 1956(h), the conspiracy subdivision of the money laundering statute. A defendant must have a specific intent to be guilty of either domestic or foreign money laundering. *See* 18 U.S.C. § 1956(a)(1)(A), (a)(2). Acting with the intent to "promote the carrying on of specified unlawful activity" is one of the intents described in the statute. *See* 18 U.S.C. § 1956(a)(1)(A)(i), (a)(2)(A). The indictment charges that the defendants acted with the intent to promote a wire fraud scheme to defraud the Canadian government of revenue. Section 1956(c)(7)(A) defines "specified unlawful activity" as including: "any act or activity constituting an offense listed in section 1961(1) of this title . . . ."[1] Wire fraud is among the offenses listed in Section 1961(1). However, the defendants argue that the government lacks the power to criminalize wire fraud aimed at depriving a foreign government of tax or customs revenue. Consequently defendants

[1] Section 1956(c)(7)(A) contains an exception for acts indictable under subchapter II of Chapter 53 of Title 31. Defendants do not argue that this exception applies.

reason that wire fraud aimed at depriving a foreign government of tax or customs revenue cannot be the "specified unlawful activity" required by Section 1956(a). 18 U.S.C. § 1956(a)(1)(A)(i), (a)(2)(A).

Defendants rely on *Boots*, 80 F.3d 580. The *Boots* defendants were convicted, among other things, of committing wire fraud in furtherance of a scheme to transport tobacco from Akwesasne through the Passamaquoddy Reservation in Maine into Canada without payment of Canadian excise duties or taxes. *Id.* at 582-583. The United States Court of Appeals for the First Circuit found that the government's attempt to punish this conduct ran afoul of the "revenue rule" which holds "that courts generally will not enforce foreign tax judgments." *Id.* at 587. The appellate court noted that revenue laws "directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts." *Id.* The court found that the district court could not convict the defendants without determining whether a violation of Canadian tax laws was intended and ruling on any claims or defenses the defendants might have with respect to those laws. *Id.* The court then reasoned that "for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government." *Id.*

The First Circuit also noted that the smuggling of goods into a foreign country is criminal only if the foreign government has a reciprocal law. *Id.* at 588 (citing 18 U.S.C. § 546). Although the court conceded that 18 U.S.C. § 546 would not impliedly preempt the use of the general federal anti-fraud statutes against smuggling schemes if the two statutes could be applied consistently, the court found that it could not give full effect to the wire fraud statute in the context of foreign tax evasion "without threatening the reciprocity provision in

section 546, and offending generally the salutary principle underlying the revenue rule." *Id.* Based both on the revenue rule and the preemption problems triggered by Section 546, the court found that section 1343 could not be read to reach wire fraud aimed at depriving a foreign government of its tax revenues. *Id.*

The court buttressed its conclusion by applying the rule of lenity which holds that "the harsher of two possible readings of a criminal statute will be enforced only when Congress has spoken clearly." *Id.*

The government questions the soundness of the *Boots* holding on several bases. First, the government notes that courts have held that the wire and mail fraud statutes can be used to reach wire fraud schemes whose aim is evasion of state or federal taxes. *See United States v. Dale*, 991 F.2d 819, 849 (D.C. Cir.) (wire fraud, federal taxes), *cert. denied*, 510 U.S. 1030 (1993); *United States v. Helmsley*, 941 F.2d 71, 94-95 (2d Cir. 1991) (mail fraud, state taxes), *cert. denied*, 502 U.S. 1091 (1992); *United Sates v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983) (wire fraud, federal and state taxes), *cert. denied*, 467 U.S. 1241 (1984). Next, the government points to the fact that the wire fraud statute reaches schemes whose intended victim is a foreign national. *See United States v. Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). While both the government's contentions are true — and were acknowledged as such by the *Boots* court — they do not go to the heart of the *Boots* holding. *Boots*, 80 F.3d at 586-87. *Boots* holds only that the wire fraud statute cannot be used to reach frauds aimed at depriving a foreign government of tax revenues.

More saliently, the government argues that because a wire fraud prosecution does not require the court to enforce a foreign country's tax judgment, the revenue rule does not

apply. The government's argument has two prongs. First, there is no tax judgment that the court must enforce in this prosecution. Second, it is not necessary to find that the victim has actually been defrauded to convict for wire fraud. *See United States v. Eisen*, 974 F.2d 246, 253 (2d Cir. 1992), *cert. denied*, 507 U.S. 1028 (1993). The government argues that the thrust of the wire fraud statutes is to prohibit the misuse of the wires and not to deter tax fraud against foreign governments. Because the government need not prove that Canada was actually defrauded, it asserts that the First Circuit was wrong in finding that the district court would have to assess the legality of the Canadian statute in determining whether the defendants were guilty of wire fraud.

The government also contends that interpreting the wire fraud statute to include foreign customs frauds does not conflict with 18 U.S.C. § 546, which allows the United States government to penalize smuggling into a foreign country by "vessel" only if that country has a reciprocal statute. Again, the goverment makes this argument based on the fact that the wire fraud statute is aimed at wire fraud and not at smuggling and does not require successful completion of the scheme.

Finally, the government argues that the rule of lenity does not apply because the wire fraud statute is not ambiguous.

None of the government's arguments adequately responds to the core of the First Circuit's revenue rule rationale, which was that in order to find whether the defendant had a criminal intent to defraud, the court necessarily must interpret the foreign revenue law and determine its validity. *Boots*, 80 F.3d at 587. The government's argument that defendants need not have been successful in defrauding the Canadian government misses the point. Whether or not the defendants succeeded in defrauding the Canadian government, they must have in-

tended to do so. If the law they intended to violate was not valid, the defendant could not have had a criminal intent.

Therefore, I must dismiss the indictment based on the revenue rule. *Boots*, 80 F.3d at 587. Having determined that the revenue rule bars this prosecution, I need not consider the defendants' alternative contention that the government has failed to plead fraud adequately.

II. Remaining Motions

The dismissal of the indictment moots the parties' remaining requests.

CONCLUSION

Because prosecution of this indictment would violate the revenue rule, the indictment is dismissed.

IT IS SO ORDERED.

Dated: December 20, 1996
Syracuse, New York

/s/Rosemary S. Pooler
ROSEMARY S. POOLER
District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Court House
40 Foley Square
New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifth day of February one thousand nine hundred and ninety-eight.

USA

v

Trapilo

FILED
Feb. 5, 1998

Dkt. No: 97-1011

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Lyle David Pierce, III.

Upon consideration by the panel that decided the appeal, it is Ordered that the said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: /s/ Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

****

UNITED STATES OF AMERICA

v. Criminal No. 96-CR-54

ROBERT TRAPILO,
LYLE DAVID PIERCE, III,
a/k/a "Joe Martin,"
a/k/a "Joe Boy,"
REGINA PIERCE,
CARL TARBELL, a/k/a "Jake,"
PATRICIA TARBELL, a/k/a "Patty,"
ARTHUR TARBELL, and
WAYNE STEHLIN,

Defendants.

RSP

I N D I C T M E N T

VIO: 18 US.C.§1956(h)
18 USC §982
(Criminal Forfeiture)
[Felony]
(1 Count)

****

THE GRAND JURY CHARGES:

COUNT ONE

THE CONSPIRACY TO ENGAGE IN FINANCIAL TRANSACTIONS IN FURTHERANCE OF A SCHEME TO DEFRAUD

Beginning on a date unknown to the Grand Jury, but prior to February 1994, and continuing up to at least March 1, 1995, in the Northern District of New York, and elsewhere, the defendants,

ROBERT TRAPILO,
LYLE DAVID PIERCE, III, a/k/a "Joe Martin,"
a/k/a "Joe Boy,"
REGINA PIERCE,
CARL TARBELL, a/k/a "Jake,"
PATRICIA TARBELL, a/k/a "Patty,"
ARTHUR TARBELL, and
WAYNE STEHLIN

and other persons, both known and unknown to the Grand Jury, did knowingly and willfully combine, conspire, confederate and agree

to commit an offense against the United States, that is: (a) to transport monetary instruments (currency) to a place within the United States from a place outside the United States (Canada) with the intent to promote the carrying on of specified unlawful activity, that is, a wire fraud scheme to defraud the Canadian government of revenue, and (b) to conduct, and attempt to conduct, a financial transaction, affecting interstate and foreign commerce, which, in fact, involved the proceeds of specified unlawful, that is, a wire fraud scheme to defraud the Canadian government of revenue, in violation of Title 18, United States Code, Section 1343, knowing that the property involved in the financial transaction represented proceeds of the scheme to defraud the Canadian government of revenue, and with the intent to promote the carrying on of this specified unlawful activity.

THE SPECIFIED UNLAWFUL ACTIVITY

It was part of this conspiracy that the defendants would participate in an illegal venture to smuggle liquor from the United States into Canada where it would be sold on the "black market" to avoid the payment of Canadian taxes and duties.

It was a further part of the scheme to defraud that the liquor to be utilized in the smuggling scheme would be purchased through interstate and international telephone calls, facsimile, and wire transmissions, and

It was further part of the scheme that the liquor would be transported in interstate commerce to the St. Regis Mohawk Indian Reservation in Upstate New York where the defendants and those acting in concert with them would smuggle the liquor from the United States into Canada where it would be sold on the "black market," thereby avoiding the payment of Canadian taxes and duties.

It was further part of the scheme that Canadian currency (funds) generated by the scheme would then be converted into United States currency which would be utilized to conduct financial transactions promoting the scheme.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects and purposes thereof, the following overt acts, among others, were committed or caused to be committed by the defendants, and others, in the Northern District of New York and elsewhere:

1. On or about March 18, 1994, WAYNE STEHLIN and ROBERT TRAPILO began ordering liquor under the name Windsail Trading.

2. On or about March 29, 1994, WAYNE STEHLIN and ROBERT TRAPILO caused the incorporation of BLSH Trading.

3. On or about May 17, 1994, ROBERT TRAPILO opened an account in the name of BLSH Trading at the Marine Midland Bank.

4. At various times from March 18, 1994 until July 21, 1994, ROBERT TRAPILO ordered tractor trailer loads of liquor from the David Sherman Corporation in St. Louis, Missouri.

5. At various times from March 18, 1994 until February 1, 1995, ROBERT TRAPILO and LYLE DAVID PIERCE, III, a/k/a "Joe Martin," a/k/a "Joe Boy," caused shipments of liquor to be transported in interstate commerce from St. Louis, Missouri to the Northern District of New York.

6. At various times from March 25, 1994 until February 2, 1995, ROBERT TRAPILO and LYLE DAVID PIERCE, III,

"a/k/a "Joe Boy," a/k/a "Joe Martin," caused currency to be deposited and wire transfers to be made from the Northern District of New York to the David Sherman Corporation in St. Louis, Missouri.

7. At various times from May 10, 1994 until August 18, 1994, ROBERT TRAPILO ordered tractor trailer loads of liquor from Consolidated Distilled Products in Chicago, Illinois.

8. At various times from May 17, 1994 until August 25, 1994, ROBERT TRAPILO caused shipments of liquor from Consolidated Distilled Products to be transported in interstate commerce from Chicago, Illinois to the Northern District of New York.

9. At various times from July 28, 1994 until August 9, 1994, ROBERT TRAPILO, REGINA PIERCE, and others deposited currency and purchased teller checks at the Marine Midland Bank in Massena, New York.

10. At various times during the course of the conspiracy CARL TARBELL, a/k/a "Jake," and PATRICIA TARBELL, a/k/a "Patty," accepted delivery of liquor shipments and, aided and abetted by others unknown to the Grand Jury, caused the liquor to be transported in international commerce from the United States to Canada where it would be sold without the payment of Canadian taxes and duties.

11. At various times during the course of the conspiracy WAYNE STEHLIN accepted delivery of liquor shipments and, aided and abetted by others unknown to the Grand Jury, caused the liquor to be transported in international commerce from the United States to Canada.

12. On or about August 3, 1994, PATRICIA TARBELL directed ARTHUR TARBELL to transport more than $10,000 in currency from Canada into the United States.

13. On or about August 4, 1994, PATRICIA TARBELL directed ARTHUR TARBELL to transport more than $10,000 in currency from Canada into the United States.

14. On or about August 8, 1994, PATRICIA TARBELL directed ARTHUR TARBELL to transport more than $10,000 in currency from Canada into the United States.

15. On or about August 9, 1994, PATRICIA TARBELL directed ARTHUR TARBELL to transport more than $10,000 in currency from Canada into the United States.

16. On August 9, 1994, PATRICIA TARBELL and ROBERT TRAPILO caused Chester Zwissler to attempt to purchase a teller's check at the Marine Midland Bank in Massena, New York with $77,520.60 in U.S. currency.

17. On or about December 19, 1994, ROBERT TRAPILO and LYLE DAVID PIERCE, III, a/k/a "Joe Martin," a/k/a "Joe Boy," traveled in international commerce from Canada to St. Louis, Missouri.

18. At various times during the course of the conspiracy, ROBERT TRAPILO, LYLE DAVID PIERCE, III, a/k/a "Joe Martin," a/k/a "Joe Boy," REGINA PIERCE, CARL TARBELL, a/k/a "Jake," PATRICIA TARBELL, a/k/a "Patty," and WAYNE STEHLIN caused various individuals, known and unknown to the Grand Jury, to transport currency from Canada into the United States in order to promote the scheme.

All in violation of Title 18, United States Code, Section 1956(h).

FORFEITURE

THE GRAND JURY FURTHER CHARGES:

The allegations of Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to 18 U.S.C. § 982(a)(1).

The defendants,

ROBERT TRAPILO,
LYLE DAVID PIERCE, III, a/k/a "Joe Martin,"
a/k/a "Joe Boy,"
REGINA PIERCE,
CARL TARBELL, a/k/a "Jake,"
PATRICIA TARBELL, a/k/a "Patty,"
ARTHUR TARBELL, and
WAYNE STEHLIN

have interests in personal property involved in the violation of 18 U.S.C. § 1956 charged in Count One and in property traceable to such property. All such interests, wherever located and in whatever names held, are therefore subject to forfeiture to the United States of America pursuant to 18 U.S.C. § 982(a)(1). Such interests include, but are not limited to:

(1) $6,831,072.38 in United States currency (including $77,520.60 in United States currency seized by United States Treasury agents on August 9, 1994).

If any of the property described above as being subject to forfeiture pursuant to Title 18, United States Code, Section 982 as a result of any act or omission of the defendants--

(1) cannot be located upon the exercise of due diligence;
(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value, or

(5) has been commingled with other property which cannot be subdivided without difficulty,

it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b)(1) to seek forfeiture of any other property of said defendants up to the value of said property listed above as being subject to forfeiture.

All pursuant to Title 18, United States Code, Section 982.

A TRUE BILL

/s/ illegible

FOREPERSON OF THE GRAND JURY

Dated: February 29, 1996
At: Syracuse, New York

By: /s/ Gregory A. West

Gregory A. West
Assistant United States Attorney
Bar Roll No. 501530

(2)

FILED
JUL 6 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 97-1792 and 97-8964

In the Supreme Court of the United States

OCTOBER TERM, 1997

LYLE DAVID PIERCE, III, AND
REGINA PIERCE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
Counsel of Record
JAMES K. ROBINSON
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Department of Justice
Washington, D.C. 20530-0001
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17 pp

QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits schemes to use the interstate wires in the United States to defraud a foreign government of tax revenue.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1792

LYLE DAVID PIERCE, III, PETITIONER

v.

UNITED STATES OF AMERICA

No. 97-8964

REGINA PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 130 F.3d 547.[1] The opinion of the district court (Pet. App. 13a-20a) is unreported.

[1] All "Pet. App." citations refer to the appendix to the petition in No. 97-1792.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. A petition for rehearing was denied on February 5, 1998 (Pet. App. 21a). The petition for a writ of certiorari in No. 97-8964 was filed on May 4, 1998. The petition for a writ of certiorari in No. 97-1792 was filed on May 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Over the past decade, as the Canadian government has significantly increased the taxes and duties on liquor and tobacco products, a lucrative "black market" has arisen for liquor and tobacco products smuggled into Canada from the United States. The St. Regis Mohawk Indian Reservation (or Akwesasne), which straddles the boundary between the United States and Canada, has become a center for such smuggling activity. Pet. App. 3a-4a; Gov't C.A. Br. 2-3.

2. On February 29, 1996, a federal grand jury in the Northern District of New York returned a single-count indictment charging petitioners and others with conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)-(2) and (h). The conspiracy charge arose out of the defendants' alleged participation in an enterprise to smuggle liquor through the Reservation into Canada. Pet. App. 3a-5a, 22a-28a.

According to the indictment, petitioners and their co-conspirators, using interstate telephone calls, facsimiles, and wire transmissions, ordered large shipments of liquor from suppliers in the United States. They allegedly stored the liquor on the Reservation, smuggled the liquor into Canada, avoiding Canadian

customs agents, and delivered the liquor to black marketeers in such cities as Montreal and Toronto. The conspirators allegedly transported the Canadian currency generated by the liquor sales back to the United States, where the funds were deposited or exchanged to obtain bank drafts or wire transfers, which, in turn, were used to purchase additional liquor to be smuggled into Canada. Pet. App. 4a-5a, 22a-28a.

The indictment charges that petitioners and their co-defendants conspired to violate two substantive provisions of the money-laundering statute: the prohibition on conducting a financial transaction involving "the proceeds of specified unlawful activity" with "the intent to promote the carrying on of specified unlawful activity," 18 U.S.C. 1956(a)(1)(A)(i), and the prohibition on transporting currency between the United States and another country with "the intent to promote the carrying on of specified unlawful activity," 18 U.S.C. 1956(a)(2)(A). The indictment identifies the "specified unlawful activity" as wire fraud "to defraud the Canadian government of revenue," in violation of 18 U.S.C. 1343. Pet. App. 23a.[2]

3. Petitioners and their co-defendants moved to dismiss the indictment on the ground that the United States lacks authority to prosecute wire fraud aimed at defrauding a foreign government of tax revenue. Relying on the First Circuit's decision in *United*

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[2] The money-laundering statute defines "specified unlawful activity" to include, with exceptions not relevant here, "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. 1956(c)(7)(A). Section 1961(1)(B), in turn, identifies as an offense "any act which is indictable under * * * section 1343 (relating to wire fraud)." 18 U.S.C. 1961(1)(B) (Supp. II 1996).

States v. *Boots*, 80 F.3d 580, cert. denied, 117 S. Ct. 263 (1996), the district court granted the motion. Pet. App. 13a-20a. The court reasoned that it could not determine whether the defendants had the requisite intent to defraud without passing on the validity of Canadian revenue laws, because "[i]f the law they intended to violate was not valid, the defendant could not have had a criminal intent." *Id.* at 20a. The court then concluded that inquiry into the validity of Canadian revenue laws is precluded by the common-law "revenue rule," which bars United States courts from entertaining suits to enforce foreign tax judgments. *Id.* at 17a, 20a.

4. The court of appeals reversed. Pet. App. 1a-12a. The court recognized that the text of the wire fraud statute "unambiguously prohibits the use of interstate or foreign communication systems by anyone 'who intend[s] to devise *any* scheme or artifice to defraud.'" *Id.* at 9a (quoting 18 U.S.C. 1343). The wire fraud statute thus "neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue." *Ibid.*

The court of appeals went on to hold that the common-law revenue rule is "inapplicable to the instant case" and, therefore, "provides no justification for departing from the plain meaning of the statute." Pet. App. 9a. It reasoned that United States courts need not pass on "the validity of a foreign sovereign's revenue laws"—the inquiry forbidden by the revenue rule—in order to determine whether a defendant used the wires with the intent to defraud the foreign sovereign of tax revenue. *Id.* at 11a. The wire fraud statute, explained the court, "punishes the *scheme*, not its success." *Ibid.* (quoting *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991), cert. denied, 502 U.S.

1091 (1992)). Accordingly, a defendant may violate the wire fraud statute by using the wires to carry out a scheme designed to defraud a foreign government of tax revenue, even if the scheme could not succeed because, for example, no tax was actually due. Pet. App. 10a-11a.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the wire fraud statute cannot, as a matter of law, apply to schemes to use the wires to defraud a foreign government of tax revenue. Although the Second Circuit's decision in this case conflicts with the First Circuit's decision in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 117 S. Ct. 263 (1996), we do not believe that the question presented by the petitions, which has thus far been addressed in only two circuits, requires the Court's review at this time.

1. The language of the wire fraud statute is broad. It applies to "*any* scheme or artifice to defraud * * * by means of wire, radio or television communication in interstate or foreign commerce." 18 U.S.C. 1343 (emphasis added). It contains no exception based on the identity of the victim of the fraud or the nature of the property at which the scheme was directed.

The wire fraud statute, and the analogous mail fraud statute, have thus been recognized to apply to fraudulent schemes involving the sort of victim (*i.e.*, a foreign government) and the sort of property (*i.e.*, tax revenue) involved in this case. The courts have upheld convictions of defendants who were found to have engaged in schemes to defraud foreign governments, foreign corporations, and foreign individuals. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888 (D.C. Cir.

1989) (foreign corporation owned by foreign government); *United States* v. *Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987) (foreign individual and foreign corporation), cert. denied, 484 U.S. 1042 (1988); *United States* v. *Gilboe*, 684 F.2d 235, 237-238 (2d Cir. 1982) (foreign government), cert. denied, 459 U.S. 1201 (1983).[3] The courts have also upheld mail and wire fraud convictions of defendants who were found to have engaged in schemes to defraud the federal government or a State of tax revenue. See, *e.g.*, *United States* v. *Goulding*, 26 F.3d 656, 663 (7th Cir.) (federal taxes), cert. denied, 513 U.S. 1061 (1994); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (per curiam) (federal taxes), cert. denied, 510 U.S. 906 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (state taxes), cert. denied, 502 U.S. 1091 (1992); *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975) (state taxes).

Petitioners nonetheless assert that the mail and wire fraud statutes should not be used "to protect foreign countries against fraudulent schemes," especially schemes to defraud foreign countries of tax revenue, because "[t]here is nothing in [those] statutes or their legislative histories that indicates" that

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[3] Cf. *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355, 1358-1361 (9th Cir. 1988) (en banc) (federal district court could adjudicate foreign government's civil claim under Racketeer Influenced and Corrupt Organizations Act based, in part, on predicate acts of mail and wire fraud), cert. denied, 490 U.S. 1035 (1989); *Republic of Panama* v. *BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 948-951 (11th Cir. 1997) (assuming that federal district court could adjudicate such claim by foreign government if elements were properly pleaded).

Congress intended the statutes to apply to such schemes (L. Pierce Pet. 9-10; see R. Pierce Pet. 3). Petitioners view such congressional silence as creating "ambigu[ity]" (L. Pierce Pet. 10, 11) about the reach of the mail and wire fraud statutes. As this Court recently reiterated, however, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity," but instead "demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, No. 97-634 (June 15, 1998), slip op. 5 (internal quotation marks omitted).[4]

2. In urging the inapplicability of the wire fraud statute, petitioners principally rely (L. Pierce Pet. 12-16; R. Pierce Pet. 2-4) on a judge-made doctrine—the "revenue rule"—that generally "prevent[s] a foreign country from enforcing its tax judgment in the courts of the United States." *Her Majesty the Queen*

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[4] Contrary to petitioner Lyle Pierce's suggestion (L. Pierce Pet. 11), this case does not implicate the international law principle that a country should not prosecute conduct occurring beyond its borders unless the conduct has "a substantial, direct, and foreseeable effect" within that country. Restatement (Third) of Foreign Relations Law § 421(2)(j) (1987). This case does not involve conduct that occurred solely, or even primarily, outside the United States. To the contrary, the indictment alleges numerous overt acts that petitioners and their co-conspirators committed or caused to be committed in the United States as part of the scheme to defraud Canada of tax revenue. See Pet. App. 24a-26a; see also Restatement (Third) of Foreign Relations Law § 421(2)(i) (1987) (a state may assert jurisdiction with respect to "activity in the state"). Nor can it be assumed that the alleged scheme, which included multiple transactions with at least one financial institution and two other businesses in the United States (see Pet. App. 24a-26a), had no "substantial, direct, and foreseeable effect" in this country.

in Right of the Province of British Columbia v. *Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979) (refusing to entertain suit by Canadian government to enforce provincial tax judgment); see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 413-414 (1964) (noting "the principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries"). The accepted rationale for the revenue rule is that a domestic court could not enforce a foreign tax judgment without inquiring into whether the foreign tax is "consonant with its own notions of what is proper"—an inquiry that could "seriously embarrass" the foreign state and that "involves the relations between the states themselves, with which courts are incompetent to deal." *Moore* v. *Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), aff'd on other grounds, 281 U.S. 18 (1930).[5]

This case does not implicate either the revenue rule itself or the rationale on which it is based. It is not an action brought by the government of Canada to enforce a Canadian tax judgment. It is, instead, an action brought by the United States government to enforce its own criminal laws against money laundering and wire fraud committed in this country.

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[5] The *Moore* case was brought in district court in New York against the executors of the estate of a decedent who had allegedly owed state and local taxes in Indiana. Although the court of appeals in *Moore* assumed that the same "settled principles of private international law" applied whether the party seeking to collect the tax was a foreign country or a State (30 F.2d at 602), this Court has since made clear that a State is required by the Full Faith and Credit Clause to honor another State's tax judgment. *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935).

Nor does such an action require a United States court to construe a foreign tax law, much less to pass on whether such a law is valid or "proper." It is well-settled that the mail and wire fraud statutes "punish[] the *scheme*, not its success." *Helmsley*, 941 F.2d at 94; accord *United States* v. *Bucey*, 876 F.2d 1297, 1311 (7th Cir.), cert. denied, 493 U.S. 1004 (1989).[6] In *Helmsley*, for example, the Second Circuit held that the defendant could be convicted of mail fraud in connection with a scheme to defraud New York State of tax revenue, even if she did not, in fact, owe any tax to the State. It was enough that she had used the mails to carry on a scheme designed to commit tax fraud. See *Helmsley*, 941 F.2d at 94 ("an actual tax debt is not an element of the mail fraud offense"). And, in *Bucey*, the Seventh Circuit affirmed the mail fraud conviction of a defendant who had participated in a scheme to defraud the United States of tax revenues, even though "the government was not *in fact* deprived of tax revenues" since his "tax-evading 'clients' in this case were undercover government

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[6] See also, *e.g.*, *United States* v. *Carrington*, 96 F.3d 1, 7 (1st Cir. 1996) ("The crime of wire fraud does not require that the defendant's object be attained. It only requires that the defendant devise a scheme to defraud and then transmit a wire communication for the purposes of executing the scheme."), cert. denied, 117 S. Ct. 1328 (1997); *United States* v. *Frey*, 42 F.3d 795, 800 (3d Cir. 1994) ("the success of the scheme is not relevant in a mail or wire fraud conviction"); *United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir.) ("success of the scheme and loss by a defrauded person are not essential elements of the crime under 18 U.S.C. §§ 1341, 1343"), cert. denied, 429 U.S. 924 (1976); *United States* v. *Jackson*, 451 F.2d 281, 283 (5th Cir. 1971) ("The Wire Fraud Statute does not require that the scheme be successful, or even that the victim be deceived."), cert. denied, 405 U.S. 928 (1972).

agents." 876 F.2d at 1311. "[T]he fact that the government was not actually deprived of tax revenues does not warrant reversal of [the defendant's] conviction," the court explained, because "the ultimate success of the fraud and the actual defrauding of a victim are not necessary prerequisites to a successful mail fraud prosecution." *Ibid.*

Similarly, here, the government must prove that petitioners and their co-conspirators intended to defraud Canada of taxes and duties.[7] But the government need not also prove that they actually did defraud Canada (or would have done so had the scheme not been discovered). The fraudulent scheme could be established without proof that they were required by Canadian law to pay taxes and duties on liquor brought into the country for commercial sale. Accordingly, contrary to petitioner Lyle Pierce's assertions (L. Pierce Pet. 5, 14), our courts need not decide whether the Canadian revenue laws apply to "aboriginal people," such as petitioners, in order for petitioners to be convicted of the charged conspiracy to engage in financial transactions in furtherance of a scheme to defraud the Canadian government of reve-

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[7] The government will seek to establish the requisite criminal intent at trial by offering evidence that, among other things, petitioners and their co-conspirators conducted their activities in code, destroyed records of their transactions, and operated under cover of darkness. Gov't C.A. Br. 14. Petitioners may, of course, attempt to persuade the jury that they did not possess such intent, for example, by arguing that they reasonably believed that the Canadian revenue laws did not apply to them and their co-conspirators. But such a defense does not, as petitioners suggest (L. Pierce Pet. 14-15; R. Pierce Pet. 2), require any determination of what Canadian law actually provides. It merely requires a finding as to what petitioners reasonably believed the law to be.

nue.[8] Nor need our courts otherwise pass on the validity or the construction of the Canadian revenue laws. It is thus evident that domestic criminal prosecutions such as this one do not present the concerns that, as explained by Judge Hand in *Moore* v. *Mitchell*, motivated the adoption of the revenue rule in the different context of civil suits by foreign governments to enforce their own tax judgments. Cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990) (explaining that "the factual predicate for application of the act of state doctrine d[id] not exist" where "[n]othing in the present suit requires the Court to declare invalid * * * the official act of a foreign sovereign").

3. We recognize, as did the Second Circuit, that the decision below conflicts with the First Circuit's decision in *United States* v. *Boots*, *supra*, on the question whether the wire fraud statute encompasses schemes to defraud a foreign government of tax revenue. See Pet. App. 3a (noting "disagree[ment] with the reasoning in *Boots*").[9] But no appellate or district court in any other circuit has yet had an occasion to address that question. We thus cannot say that the question arises with sufficient frequency to require this Court's consideration at this time. If the Court

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[8] Petitioner Lyle Pierce implicitly concedes (L. Pierce Pet. 11) that no Canadian court has held that an aboriginal person is exempt from having to pay taxes and duties on liquor brought into Canada for commercial sale.

[9] The two cases differ to the extent that *Boots* involved a prosecution directly under the wire fraud statute, while this case involves a prosecution under the money-laundering statute, with wire fraud as the "specified unlawful activity." The court of appeals did not perceive that difference as affecting the analysis of the question presented.

is nonetheless inclined to resolve the conflict before it deepens, we are not aware of any reason why this would be an unsuitable case in which to do so.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LYLE DAVID PIERCE, III, also known as Sealed Deft. 2, also known as Joe Martin, also known as Joe Boy,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER LYLE DAVID PIERCE, III

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REPLY BRIEF FOR PETITIONER LYLE DAVID PIERCE, III

Lyle David Pierce, III, hereby submits this reply to the United States' Opposition to his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

The government concedes in its brief in opposition that the United States Court of Appeals for the Second Circuit's decision in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), is in direct conflict with the First Circuit's decision in *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, ____ U.S. ____, 117 S. Ct. 263 (1996). SG Opp. 11.[1] It further acknowledged that if this Court is "inclined to resolve the conflict before it deepens, we [the Solicitor General's office] are not aware of any reason why this would be an unsuitable case in which to do so." SG Opp. 12.

The only argument the government has made against resolving the conflict at this time is that it currently exists in only two United States Circuit Courts of Appeals. The Solicitor General has often sought and this Court has often granted certiorari in just such a situation. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (granting certiorari to resolve conflict between the Ninth and Sixth Circuits on admission of plea statements for impeachment); *United States v. John O. Irvine and First Trust Nat'l Ass'n*, 511 U.S. 224 (1994) (granting certiorari to resolve conflict between the Eighth and Eleventh Circuits regarding a gift tax issue); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439 (1993) (granting certiorari to resolve conflict

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[1] All "SG Opp." citations refer to the Solicitor General's Brief in Opposition to Mr. Pierce's Petition for a Writ of Certiorari.

between the D.C. and Second Circuits concerning whether Title 12, section 92, was valid law); *United States v. California*, 507 U.S.746 (1993) (granting certiorari to resolve conflict between the Ninth and Eleventh Circuits over illegal state taxation issue). Moreover, this Court frequently grants certiorari in cases where the United States, such as in this case, acknowledges the conflict and concedes that the issue warrants review. *Id.*

There are important reasons why this Court should resolve the conflict that exists between the First and Second Circuit Courts of Appeals now. New and "creative" initiatives by federal prosecutors to apply fraud and money laundering statutes to alleged schemes involving foreign governments, first of all, raises significant questions about the interrelationship of federal prosecutions with foreign policy considerations and the common law "revenue rule."

The current and direct conflict between the First and Second Circuits further fosters uncertainty about the international reach of federal criminal statutes, encourages prosecutorial "forum-shopping," and permits disparate treatment of persons allegedly engaged in similar activities. The use of the wire fraud statute to prosecute aboriginal persons for the transportation of goods from sovereign areas straddling the United States - Canadian border into Canada also raises substantial issues concerning the rights of aboriginal people under Canadian law and international treaties.

The government argues in its opposition that the language of the wire fraud statute is broad and applies to "*any* scheme or artifice to defraud." SG Opp. 5. The view that the fraud statutes essentially have no boundaries ignores the constraints imposed by this Court in *McNally v. United States*, 483 U.S. 350 (1987), and the admonition of the Eleventh Circuit in *United States v. Brown:*

> The implications of allowing the federal fraud statutes to be treated by federal prosecutors as a largely unlimited device to attack wrongdoing whenever prosecutors feel wrongdoing exists are extremely worrisome to us.

79 F.3d 1550, 1562, n.20 (11th Cir. 1996). The Second Circuit's decision in *Trapilo* raises anew whether the application of fraud statutes is essentially limitless. Mr. Pierce was prosecuted under the money laundering statute (with the predicate wire fraud statute serving as the "specified unlawful activity") for a scheme to defraud a foreign government of tax revenue even though such a prosecution clashes with the revenue rule and permits the harsh money laundering statute to be invoked in a manner that is inconsistent with the restrictions precluding its similar use for domestic tax-related prosecutions. While the government cites cases in its opposition where fraud statutes were held to apply to domestic tax fraud, these cases, upon careful reading, do not support the government's position and do not resolve the conflict between the First and Second Circuits.

The government apparently is seeking to restrict the application of the revenue rule to actions brought by a foreign government, such as the Canadian government, to enforce a foreign tax judgment. SG Opp. 8. There is no precedent for such an interpretative strait-jacket. *See also* Restatement (Third) of Foreign Relations § 483 (1987). The First Circuit in *Boots* specifically held that the revenue rule precluded prosecution under the wire fraud statute for a scheme to defraud a foreign government of tax revenue. 80 F.3d at 587.

An assessment of the facts alleged in the Indictment in this case illustrates the fallacy of the government's argument that construing foreign tax law would be unnecessary during the prosecution of Mr. Pierce. The alleged scheme involves evading Canadian taxes. The alleged victim of the scheme is

Canada. By prosecuting Mr. Pierce, the United States, through the Department of Justice and its federal prosecutors, is taking steps to enforce Canada's tax laws.

Mr. Pierce does not dispute the general notion that a scheme to defraud need not be successful in order to obtain a conviction. In a prosecution charging that petitioner participated in a scheme to evade payment of Canadian taxes, however, it is inevitable that Canada's tax laws will need to be interpreted in order to determine whether petitioner had the requisite intent to violate Canada's laws and whether his belief that Canada's tax laws did not apply to him was a reasonable one. *See Cheek v. United States*, 498 U.S. 192 (1991). The First Circuit held in *Boots* that Canada's tax laws must be interpreted for these reasons. This and the other significant differences in the two decisions support the view that this Court should resolve this confict before "it deepens."

For these reasons, as well as those set forth in Mr. Pierce's petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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